No. 16-1371

IN THE

Supreme Court of the United States

TERRENCE BYRD,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* FOR PROFESSOR MORGAN A. CLOUD IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus is the Charles Howard Candler Professor of Law at Emory University School of Law, where he specializes in the fields of criminal law, constitutional criminal procedure, comparative constitutional law, white collar crime, and digital privacy. Amicus teaches a course on constitutional criminal procedure that covers Fourth Amendment searches and seizures, and has written numerous scholarly publications on Fourth Amendment history, theory, and doctrine. Amicus has no interest in the outcome of this case, but has an interest in seeing that Fourth Amendment search and seizure law and the law of standing develop in ways consistent with the history and meaning of the Fourth Amendment.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than *amicus curiae*, their members, or their counsels made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.3, each party has consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

In *Jones v. United States*, 565 U.S. 400 (2012) and *Florida v. Jardines*, 569 U.S. 1 (2013), this Court held that when the government physically intrudes into a constitutionally protected area to obtain information, it relies upon a property-based rationale to determine whether a "search" occurred. These decisions recognized that property and reasonable expectation of privacy theories serve completementary functions in Fourth Amendment jurisprudence.

Fourth Amendment standing traditionally was linked to property rights, but in recent years property has been supplanted by a reasonable-expectation-of-privacy model intended to determine whether a person's substantive Fourth Amendment rights were violated. Nonetheless, this Court has frequently turned to property to help it determine whether a reasonable expectation of privacy was violated.

Applying traditional property law rules, Mr. Byrd was a bailee who has standing to challenge the search of the automobile. Under traditional bailment principles, he became a bailee when Ms. Reed gave him possession and control of the automobile she rented.

Mr. Byrd also has "standing" under the reasonable-expectation-of-privacy test. Among the factors this Court has considered in making that determination are whether the person had dominion and control over the property, whether he had the right to exclude others, and whether he had property

related interests like ownership or possession. Using those criteria, Mr. Byrd has Fourth Amendment "standing."

ARGUMENT

I. THIS COURT EMPLOYS BOTH PROPERTY AND PRIVACY PRINCIPLES TO INTERPRET THE FOURTH AMENDMENT.

A. When there is a physical intrusion into a person's personal property, this Court first considers an individual's rights from a property-based perspective.

This Court has confirmed that when the government physically intrudes upon personal property to obtain information, it first looks to a property-based rationale to determine whether there was a "search" within the meaning of the Fourth Amendment. *See* U.S. CONST. amend. IV; *see also United States v. Jones*, 565 U.S. 400, 405–408 (2012).

"[U]ntil the latter half of the 20th century," this Court based much of its Fourth Amendment jurisprudence on property law concepts. *Id.* at 405 (citing *Kyllo v. United* States, 533 U.S. 27, 31 (2001). Property concepts defined when a search or seizure occurred, *id.*, and only someone with a property-based interest could contest the search or seizure of property. *See Jones v. United States*, 362 U.S. 257, 257–267 (1960).

Employing property-based theories to define Fourth Amendment rights is consistent with the Amendment's text, which "reflects its close connection to property" otherwise the phrase 'in their persons, houses, papers, and effects'" would have been superfluous." *Id.* at 405.

During the latter decades of the twentieth century, this Court began employing theories not dependent upon traditional property law concepts to resolve Fourth Amendment disputes. *See, e.g., Jones*, 362 U.S. at 257–267 (discussing standing); *Silverman v. United States*, 365 U.S. 505, 513 (1961) (seizure of intangible conversations); *Warden v. Hayden*, 387 U.S. 294, 325 (1967) (overruling the mere evidence rule).

In *Katz v. United States*, 389 U.S. 347 (1967), this Court overruled the property-based "trespass doctrine" announced in *Olmstead v. United States*, 277 U.S. 438, 466 (1928). *Katz* held that a search occurred when federal law enforcers used an electronic eavesdropping device to listen to conversations made from a public telephone booth, even in the absence of a physical trespass into a constitutionally protected area. *Katz*, 389 U.S. at 350–353. In subsequent cases, this Court developed a two-part test derived from Justice Harlan's concurring opinion in *Katz* to resolve numerous Fourth Amendment questions by determining whether government actions violated a person's "reasonable expectation of privacy." *See id.* at 360 (Harlan, Justice, concurring); *see also Jones*, 565 U.S. at 406.

In the decades following the *Katz* decision, this Court has employed the reasonable-expectation-of-privacy test so frequently, and in so many different settings, that many have concluded that the reasonable-expectation-of-privacy test replaced property as the exclusive tool for deciding Fourth Amendment questions. *See, e.g., Jones*, 565 U.S. at 419 (this Court should "analyze the question

presented in this case by asking whether respondent's reasonable expectations of privacy were violated") (Alito, J., concurring); *Florida v. Riley*, 488 U.S. 445, 467 (1989) (a majority of the Justices agree that determining whether appellee was subjected to a search depends upon whether he "had a reasonable expectation of privacy") (Blackmun, J., dissenting); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Oliver v. United States*, 466 U.S. 170, 173 (1984) ("[T]he touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy'").

This interpretive theory is consistent with language contained in the *Katz* opinion. For example, *Katz* declared that the "Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. The sheer number of opinions employing the expectations test while eschewing property-based theories also suggested that this interpretation of *Katz* was correct. It was not.

B. Privacy and property serve complementary functions in Fourth Amendment jurisprudence.

Recently, this Court has emphasized that an individual's "Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Jones*, 565 U.S. at 406; *see also Florida v. Jardines*, 569 U.S. 1, 11 (2013) (explaining that the reasonable-expectation-of-privacy test is not the only mode of determining whether a Fourth Amendment violation occurred). Rather than replace property in Fourth Amendment jurisprudence, *Katz's* reasonable-expectation-of-privacy test "has been *added to*, not *substituted for*,

the common-law trespassory test." *Id.* at 409; *see also id.* at 414 (Sotomayor, J. concurring); *see also Jardines*, 569 U.S. at 12–16 (Kagan, J., concurring).

Neither privacy nor property is the exclusive test for resolving Fourth Amendment disputes. The two theories *complement* one another. Government actions involving no physical intrusion "remain subject to *Katz* analysis," *Jones*, 565 U.S. at 415 (Sotomayor, J. concurring), while actions involving a physical intrusion are subject to the common-law trespass test. *Id.*

Property-based rules establish "a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment has 'undoubtedly occurred.'" *Jardines*, 569 U.S. at 5.

While *Katz* adds to that Fourth Amendment baseline, it does not subtract anything from the Amendment's protections. It simply recognized that property rights "are not the sole measure of Fourth Amendment violations." *Soldal v. Cook County*, 506 U.S. 56, 64 (1992); *see also Jones*, 565 U.S. at 414 (Sotomayor, J. concurring) ("*Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it.").

C. Recognizing that property and privacy are complementary theories is consistent with Katz.

A careful reading of the *Katz* opinion reveals that this Court adopted neither property nor privacy as the exclusive theory for interpreting the Fourth Amendment. Instead, *Katz* recognized that each approach was useful in some contexts, but inapplicable in others.

The *Katz* majority concluded that "the correct solution of Fourth Amendment problems *is not necessarily promoted* by incantation of the phrase 'constitutionally protected area.'" *Katz*, 389 U.S. at 350 (emphasis added). This is not a blanket rejection of property. It offers the unremarkable insight that property provides the solution of some, but not all, Fourth Amendment problems.

Katz also rejected the idea that privacy did, or could, serve as the exclusive interpretive theory: "[T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." *Id.* at 351. Rather, the Fourth Amendment only "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." *Id.* at 350.

These passages from *Katz* demonstrate that even at the birth of the reasonable-expectation-of-privacy doctrine, this Court recognized that property and privacy existed together as tools for solving different Fourth Amendment problems.

Viewed from this perspective, it is apparent that many of this Court's post-*Katz* decisions also were consistent with the dual property-privacy interpretive theory.

For example, some prominent post-*Katz* decisions applied the reasonable-expectation-of-privacy test in cases where government actors used technological devices to conduct surveillance without physically trespassing upon private property. *See, e.g., Riley*, 488 U.S. at 447–448 (observation of a home's curtilage from a helicopter flying at a legal altitude); *Ciraolo*, 476 U.S. at 207, 209 (1986) (observation of home's curtilage from an airplane flying in navigable airspace); *Dow Chemical v. United States*, 476 U.S. 227, 229 (1986) (photographs of a private industrial facility taken from an airplane).

Other decisions found that government agents' physical intrusions upon private property did not violate a person's reasonable expectation of privacy because the intrusions did not violate property interests protected by the Fourth Amendment. *See, e.g., California v. Greenwood*, 486 U.S. 35, 43 (1988) (search of garbage "abandoned" for collection did not violate a reasonable expectation of privacy); *Oliver*, 466 U.S. at 178 (trespass in open fields not a Fourth Amendment search); *Dunn v. United States*, 284 U.S. 390, 407 (1932) (trespass in open fields not a Fourth Amendment search).

Conversely, some post-*Katz* opinions relied upon property theory to decide Fourth Amendment questions. *See, e.g., Jardines*, 569 U.S. at 11–12 (bringing trained drug detecting dog within a home's

curtilage to search for drugs within the home was a trespass violating Fourth Amendment property rights); *Jones*, 565 U.S. at 400–413 (physical trespass on private vehicle to install GPS tracking device violated Fourth Amendment); *Soldal*, 506 U.S. at 61 (seizure of mobile home violated Fourth Amendment property rights).

Finally, in a number of cases this Court turned to property law to determine decide whether any reasonable expectation of privacy existed or was violated. *See, e.g., Oliver*, 466 U.S. at 180 (the common law "open fields" rule was consistent with a finding that no reasonable expectation of privacy was violated by a government search in open fields); *Dunn*, 284 U.S. at 390–407; *Riley*, 488 U.S. at 447–448 (surveillance of a home's curtilage did not violate reasonable expectation of privacy, but Fourth Amendment violation might have occurred if helicopter had flown close enough to the ground to physically interfere with use of private property).

The continued vitality of both property and privacy concepts in Fourth Amendment jurisprudence helps explain why a bailee of private property, like Mr. Byrd, has a right to challenge the search and seizure of bailed property.

II. BOTH PROPERTY AND PRIVACY CAN BE USED TO RESOLVE FOURTH AMENDMENT STANDING QUESTIONS.

Property and privacy analyses are relevant for determining whether a person has Fourth Amendment standing to challenge government searches and seizures. Once again, property and

privacy provide complementary theories, and this dual-theory approach is consistent with this Court's Fourth Amendment standing decisions.[2]

The claim that property remains part of Fourth Amendment standing jurisprudence might appear to contradict some of this Court's decisions, particularly *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). But even *Rakas* explains why, in light of this Court's recent decisions in *Jones* and *Jardines*, property concepts remain central to Fourth Amendment standing jurisprudence.

Fourth Amendment standing analysis traditionally raised multiple questions: (1) was there a search or seizure, (2) was the search or seizure unreasonable under the Fourth Amendment, and (3) was the defendant a person aggrieved because the government actions intruded upon his personal rights?[3] *See, e.g., Rakas*, 439 U.S. at 133–134; *Alderman v. United States*, 394 U.S. 165, 174 (1969); *Simmons v. United States*, 390 U.S. 377, 389 (1968); *Wong Sun v. United States*, 371 U.S. 471, 504 (1963).

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[2] Because the parties are virtually certain to address reasonable expectation of privacy questions in great detail, this brief focuses instead on property related issues likely to receive less attention in those papers. *See* Br. for Pet'r. at 17–26.

[3] In *Rakas*, this Court phrased the issues differently. It wrote that "as a general proposition, the issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged "injury in fact," and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties." *Rakas*, 439 U.S. at 139.

Rakas concluded that separate inquiries about standing and substantive rights violations were unnecessary because the "type of standing requirement discussed in *Jones* and reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine." *Rakas*, 439 U.S. at 139. After *Rakas*, the inquiry focused on determining whether a person's Fourth Amendment rights were violated by an unreasonable search or seizure.

Subsequent decisions by this Court have followed suit: "After *Rakas*, the two inquiries merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner." *See Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980). These decisions seemed to assume that privacy was the sole measure of a person's substantive Fourth Amendment rights.

This Court's recent decisions confirm that this assumption is incorrect. In some cases, expectation of privacy analysis is the appropriate analytical tool. But in cases where a physical intrusion occurs, this Court first considers an individual's property rights. *See Jones*, 565 U.S. at 415 (Sotomayor, J. concurring).

In the present case, for example, where government actors conducted a physical search and seizure of personal property, this Court should look first to property law to determine whether the Appellant's substantive Fourth Amendment rights were violated.

Even after *Rakas*, making that determination may require analysis of issues traditionally classified as standing questions, and finding the answer

difficult. "We are under no illusion that by dispensing with the rubric of standing used in *Jones* we have rendered any simpler the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure." *Rakas*, 439 U.S. at 140. Surprisingly, property rights can play a role in standing analyses based upon the expectation-of-privacy theory.

A. Fourth Amendment standing traditionally was tied to property rights.

Historically, Fourth Amendment standing was tied to property rights. Pre-*Rakas* cases either explicitly or implicitly looked to property rights to determine whether a defendant had Fourth Amendment standing.

For instance, in *Jeffers v. United States*, 342 U.S. 48 (1951), the Court found an individual who claimed ownership of contraband had standing to challenge an unlawful search and exclude the illegal fruits flowing it. *See Jeffers*, 342 U.S. 48, 54 (1951); *see also Jeffers v. United States*, 187 F.2d. 498 (1950). That was because an individual "who claims ownership *in* or *right to possession of* the premises searched or property seized" has standing to challenge an unlawful search or seizure. *Jeffers*, 187 F.2d. at 501 (emphasis added); *affrm'd by Jeffers*, 342 U.S. 48, 54.

In *Jones v. United States*, 362 U.S. 257 (1960), this Court affirmed that Fourth Amendment standing traditionally had been linked to property rights. A range of property interests, like "*ownership* in or *right to possession* of the premises,

the interest of a lessee or licensee, or of one with dominion," were the bases for standing. *Jones*, 362 U.S. at 266 (quoting *Jeffers*, 187 F.2d. at 501, *affrm'd by Jeffers*, 342 U.S. at 48).

In *Jones*, the area searched did not belong to the defendant, but the resident had allowed Jones to exercise possession, control, and dominion over the apartment to an extent sufficient to create standing. *See Jones*, 362 U.S. at 265–267; *see also Rakas*, 439 U.S. at 141; *Alderman*, 394 U.S. at 176–180 (physical trespass into home by government agents provides homeowner with standing to challenge the seizure of both tangible property and intangible conversations).

This property-based conception of standing tied to the rights of an owner or someone with a possessory interest is consistent with privacy-based understandings. Even after adopting the reasonable-expectation-of-privacy rationale, property rights continued to be factors the Court considered when analyzing Fourth Amendment standing issues.

B. Property rights continue to be important factors for determining whether a person has standing under the reasonable expectation of privacy test.

In *Rakas*, the Court concluded that an individual must possess a "legitimate expectation of privacy in the invaded space" to have standing. *Rakas*, 439 U.S. at 143. But a closer reading of *Rakas* confirms that it recognized that property rights remain essential in determining who has a legitimate expectation of privacy. *See id.* at 147–49.

The Court explained that although it was "focusing on legitimate expectations of privacy," it has not "altogether abandoned use of property concepts in determining the presence or absence of the privacy interest."*Id.* at 143, n. 12. Specifically, the Court provided:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book 2, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.

Id.

This Court applied that property-based process in *Rakas* itself, holding that the defendants had no legitimate expectation of privacy in the vehicle searched because they "asserted neither a *property* nor a *possessory interest* in the automobile, nor an interest in the property seized." *See id.* at 148 (emphasis added).

The Court concluded that the only person who had standing to challenge the search of the automobile was the owner, who also was the driver. His ownership and possession of the vehicle gave him a reasonable expectation of privacy. *See id.* at 129-130.

On the other hand, the petitioners, who were merely passengers in the automobile, did not have a reasonable expectation of privacy because "[t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized." *Id.* at 148; *see also id.* at 154 (Powell, J. concurring).

While *Rakas* overruled the "legitimately on the premises" standard announced in *Jones*, *id.* at 142-147, it left the underlying property-based analysis in *Jones* untouched. Even under *Rakas'* analysis, *Jones* would have come out the same way, as the cases "involved significantly different factual circumstances." *Id.* at 149. Unlike the defendants in *Rakas*, Jones had "complete dominion and control over the apartment and could exclude others from it," *id.*; therefore, he "*had* a legitimate expectation of privacy." *Id.* at 143 (emphasis added).

This Court has used a property-based analysis to determine whether a person possessed a reasonable expectation of privacy in other cases, as well.

In *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the Court concluded that a defendant had no reasonable expectation of privacy in his friend's purse. *See Rawlings*, 448 U.S. at 103. Once again, the Court employed indicia of ownership in deciding that Rawlings had no reasonable expectation of privacy.[4] *See id.* at 105. The defendant "never

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[4] Admittedly, the Court deviated from traditional property-based concepts by holding that Rawlings lacked standing to challenge the search that uncovered the contraband drugs,

sought or received *access* to her purse prior to that sudden bailment." *Id.* at 105. Nor did he ever have "the *right to exclude other persons* from access to Cox's [his girlfriend] purse." *Id.* at 105. This was significant because "the *right to exclude* often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest." *Id.* at 112 (emphasis added).

As these cases reveal, analyses based on property and those based on privacy often produce the same outcomes. In these situations, property rules often have a singular advantage. As this Court noted in a recent decision, "[w]e need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy, under *Katz*. One virtue of the Fourth Amendments property-rights baseline is that it keeps easy cases easy." *Jardines*, 569 U.S. at 11.

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although he claimed ownership of them. *See Rawlings*, 448 U.S. at 105-106.

III. UNDER TRADITIONAL PROPERTY RULES, MR. BYRD IS A BAILEE ENTITLED TO FOURTH AMENDMENT'S FOURTH AMENDMENT STANDING.

A. Traditional bailment principles that are still in place today would have been understood to apply at the time of the Fourth Amendment's drafting.

Bailments are a property law concept far older than the Republic. A bailment is created when there is a delivery of goods from the bailor to another person, the bailee, for a particular use. 2 WILLIAM BLACKSTONE, COMMENTARIES 395. Justice Story also defined it as a "grant of a thing to be used by the grantee gratuitously for a limited time, and then to be specifically returned." JOSEPH STORY, COMMENTARY ON THE LAW OF BAILMENTS 196 (1839); *see also Sparrow v. Airport Parking Co. of Am.*, 289 A.2d 87, 90 (Pa. Super. Ct. 1972); 2 BLACK., COMMEN. 395; *see also* William King Laidlaw, *Principles of Bailment*, 16 CORNELL L. REV. 286, 286–310 (1931).

The bailment relationship grants powers to and imposes duties on the bailee. For example, the bailee "is *entitled to the possession of the property* . . . and therefore *has a special right* or property *in the chattel* to the extent of his bailment contract." *Whitworth v. Jones*, 58 Cal. App. 492, 497 (Cal. Ct. App. 1922) (emphasis added).

Along with the right of possession, the bailee has the right to sue for damages when someone damages the property or interferes with the bailee's

possessory interest. *See, e.g., Lear Inc. v. Eddy*, 749 A.2d 971, 974 (Pa. Super. Ct. 2000); *see also Whitworth*, 58 Cal. App. at 492, 497. On the other hand, the bailment also makes the bailee liable for damage done to the owner's chattel while he has possession of it, if his negligence or unauthorized use caused the damage. *See Todd v. Figley*, 1838 Pa. LEXIS 143, at **4–6 (Pa. 1838); *see also Sanft v. Haisfield Ford, Inc.*, 178 A.2d 791, 792 (N.Y. 1962); *Lear Inc.*, 749 A.2d at 971, 974.

Common law cases elucidated these principles long before our independence, and courts continued to apply them in the early republic. For example, over 400 years ago a bailee was held liable for his servant's theft of the goods entrusted to him. *See Southcote's* case, (1601) 4 Co. Rep. 83b, 84a.

It "was well settled" that a bailment existed when someone charges another with keeping "money or any other article" safe, *Mott v. Pettit*, 1 N.J.L. 344 Sup. Ct. LEXIS 27, at **11 (N.J. 1795), and the bailee who accepted that responsibility was responsible for preserving the property even if he received no payment for his services. A bailment was created "when there is a delivery of goods or chattels to somebody who is to carry them, or do something about *gratis*, without any reward for such his work or carriage." *See Coggs v. Bernard*, (1703) 2 Ld. Raym. 909, 913–920 (also listing six forms of bailment). These rules continued to be enforced throughout the nineteenth century. *See, e.g., Hicock v. Buck*, 22 Vt. 149, 151 (Vt. 1850); *First Nat'l Bank v. Ocean Nat'l Bank*, 60 N.Y. 278, 284–285 (N.Y. 1875).

A contract is often used to create the bailment relationship, but it is not essential. "It is the element of lawful possession and the duty to account for the thing as property of another that creates bailment, regardless of whether such possession is based upon contract." *Foulke v. New York Consolidated R.R.*, 228 N.Y. 269, 275 (1920); *see also State v. Carr*, 118 N.J.L. 233, 234 (N.J. 1937); STORY, COMMENTARY ON THE LAW OF BAILMENTS 156; Laidlaw, *Principles of Bailment*, 16 CORNELL L. REV. at 286–310.

These traditional bailment rules are relevant to this litigation because Mr. Byrd was a bailee given possession of the automobile by Ms. Reed.

B. Byrd became a bailee once he had possession and exercised control over the rental automobile.

It is undisputed that Ms. Reed had lawful possession of the rented automobile and that she voluntarily transferred possession to Mr. Byrd, who accepted control over the vehicle with the intent to return it. *See* Pet. for Cert. at 5–9. He had exclusive control over the car keys, and the police conceded he had "complete control of his car." *See id.* Moreover, Byrd was also the only person using the vehicle for approximately eight hours (10:30 a.m. to 6:30 p.m.). *See id.*

This scenario describes a classic bailment relationship, not dissimilar from the relationship this Court identified in its recent decision in *Jones*. There, this Court concluded that although Jones "was not the owner," he was the "exclusive driver" of

the vehicle and "had at least the property rights of a bailee." *Jones*, 565 U.S. 400, at n. 2.

Jones was a bailee of the vehicle tracked by GPS technology because his wife, the registered owner, granted him possession of the vehicle for his "exclusive use." *Id.* at 425. As someone with a possessory interest in the vehicle, he had standing under traditional Fourth Amendment rules. *See, e.g., Jeffers*, 342 U.S. at 48–54; *Jones*, 362 U.S. at 257–273. As a bailee with possession of the vehicle rented by his fiancé, Ms. Reed, Mr. Byrd also should have standing under Fourth Amendment property jurisprudence.

C. Mr. Byrd also has standing under the reasonable-expectation-of-privacy test.

When this Court has used the reasonable-expectation-of-privacy test to determine who has Fourth Amendment "standing" to challenge an automobile search, it has emphasized the importance of possession or control of the vehicle, including control over the keys, and the right to exclude others from entering the vehicle. *See Rakas*, 439 U.S. at 155, n. 2.

This Court similarly focused on issues of control and the right to exclude others from having access to the property in *Rawlings*. There, the defendant had no control over the bag searched by the police, nor did he have the "*right to exclude other persons*" from it. *Rawlings*, 448 U.S. at 105. Therefore, like the passengers in *Rakas*, he had no reasonable expectation of privacy in the property that was searched.

In contrast, when Mr. Byrd was stopped by the police, it is undisputed that he had possession and control of the automobile, including the right to exclude people from it. *See* Pet. for Cert. at 5–9. Applying the factors employed by this Court in cases like *Rakas* and *Rawlings*, Mr. Byrd, as bailee, had a reasonable expectation of privacy in the vehicle he was driving when stopped by the state trooper. *See id.* Under a property-based analysis, and under a reasonable-expectation-of-privacy analysis, Mr. Byrd is a person aggrieved by the search and is entitled to challenge its constitutionality.

CONCLUSION

In light of the foregoing, *amicus* respectfully urges this Court to reverse the U.S. Court of Appeals for the Third Circuit's opinion and find that Mr. Byrd may challenge the constitutionality of the search of the rental car he was driving.

Respectfully Submitted,

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